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Supreme Court of the United States

October Term, 1959.

No. 657

J. A. FOLGER & COMPANY,
Petitioner,

versus

UNITED FRUIT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

MAY IT PLEASE THE COURT:

I. OPINIONS BELOW.

The opinions below are reported as set forth on Page 1 of the Petition.

II. JURISDICTION.

Jurisdictional requisites are correctly set forth in the Petition, but Respondent submits there is no basis for granting a Writ of Certiorari herein.

III. STATUTES INVOLVED.

The only statute involved is the Carriage of Goods by Sea Act, 46 U.S.C. 1303(6), set forth on page 3 of the Petition.

IV. ARGUMENT.

Petitioner's "First Question".

Respondent submits this is not a proper case for the granting of a Writ of Certiorari simply because one Judge of a Court of Appeals renders a dissenting opinion which is novel and which is not supported by any decision of any Federal Court involving the pertinent question at issue. Petitioner itself admits that the proposition on which this dissent is based "has never before been advanced." The only cases cited by Judge Hutcheson in his dissent are those cited by the District Judge in Article IV of his Conclusions of Law (R. 37, Appendix to Petition, p. 26, 170 F. Supp. 933, 936-937).

None of those authorities is in point here. They involved and discussed situations where indefinite waivers of statutes of limitations were granted or where negotiations were continued without reservations after the limitation time had run. Here, as the Court of Appeals carefully pointed out three separate times in its opinion, the extension of the one year limitation within which to bring suit was for a definite and fixed period of time.

A limited and fixed extension of the time for filing suit "up to and including April 4, 1950" was requested in the

letter of January 30, 1950, written by the Proctors of Petitioner to Respondent (Libellant Exhibit "A", R. 26), and in accordance with such request an "extension in time in which to sue through April 4th, 1950" was granted by Respondent in its reply letter of February 1, 1950 (Libellant Exhibit "B", R. 27).

Petitioner makes no contention that the decision herein is in conflict with any decision of another Court of Appeals on the same matter or that the decision is in conflict with any applicable decision of this Court. Respondent is of the opinion that no such contention can be made.

The United States Courts of Appeals and District Courts have strictly construed and applied the one year limitation for suit in the Carriage of Goods by Sea Act U.S.C. 1303(6).[1] The Court of Appeals for the Fifth Circuit in its opinion herein simply and correctly construed and applied a fixed extension of that limitation in the same way that the Courts have construed and applied the original one year limitation in the Act. There is, therefore, no important question of Federal Law which has not been, but should be, settled by this Court

Needless to say, if Judge Hutcheson's view became the law, a multiplicity of litigation would result as carriers

[1] See, among others *Bethgar v. Colorado Fuel & Iron Corp.*, 138 F. Supp. 595 (S.D.N.Y. 1955), aff'd. 245 F. 2d. 903 (2 Cir. 1957), cert. denied 355 U.S. 862 (1957); *Compagnie Tunisienne v. Lykes Bros. Steamship Co.*, 243 F.2d 683 (2 Cir. 1957); *Potter v. North German Lloyd*, 50 F. Supp. 173 (N.D. Calif. 1943); *Aluminum Supply Co., Inc. v. Lykes Bros. Steamship Co., et al.*, 1957 A.M.C. 1718 (S.D. Texas 1958 not otherwise reported).

could not grant shippers extensions of time within which to sue for fixed periods of time without subjecting themselves to suit for indefinite periods of time.

Petitioner's "Second Question".

The fallacy of Petitioner's argument on this point is readily apparent. The District Judge found no facts whatever on the trial before him. He had no need to make any Findings of Fact. The case was submitted and decided upon a stipulation of all of the facts as agreed upon by the two parties to the suit (R. pp. 17-24 incl.). The District Judge simply adopted the Stipulation of Facts as his Findings of Fact (R. 29, Appendix to Petition, p. 17, 170 F. Supp. 934). No witnesses were produced and no testimony was taken. Obviously, therefore, the McAllister[2] doctrine has no application for the Court of Appeals did not set aside any findings of fact of the District Court for there were none to set aside, whether "clearly erroneous" or not. For the same reasons Rule 52 of the Federal Rules of Civil Procedure would not be applicable.

We are supported in these conclusions by the following authorities.

In *Supervisors of Wayne Co. v. Kennicott*, 103 U.S. 554, 556-557 (1881), this Court held:

> "As to the finding. Even before the Act of 1865, * * * * * it was always held that a judgment on agreed facts spread at large on the record could be

[2] *McAllister v. United States*, 348 U.S. 19 (1954).

reviewed here on a writ of error. * * * * * Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. * * * * * *

"This record shows distinctly that the court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. * * * *

"* * * There was no issue but of law, and that the court found for the plaintiffs. The same case is brought here by the record and we are entirely satisfied it is one we have the power to review."

Again in *Saltonstall v. Russell*, 152 U.S. 628, 630 (1894), this Court said:

"The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of fact by the court was necessary * * * * * *."

In *Wiggenton v. Order of United Commercial Travelers of America*, 126 F. 2d 659, 661 (7 Cir. 1942), the Court of Appeals had no doubt on this point when it said:

"Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law. Especially is this rule applicable in the case at bar, where all the facts are stipulated. * * * * * *."

Tipton, et al. v. Bearl Sprott Co., Inc., 93 F. Supp. 496, 498 (S.D. Calif. 1950), was decided by Judge Yankwich, who wrote the Address "*Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure*", 8 F.R.D. 271. In the *Tipton* case he discussed this question fully and held:

> "As the case stands now, the facts are not in dispute, and it wholly remains for the Court to draw conclusions from the admitted facts. I have not had the benefit of any oral testimony. The advantage of the situation is that, if the Court of Appeals is not satisfied with the conclusions I have drawn, they may draw their own.
>
> "It is the accepted rule that where a case is presented on stipulated facts, the mandate of the Fed. Rules Civ. Proc. Rule 52, 28 U.S.C.A., that 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses' does not come into play. In short, when there are no witnesses, and the Court draws inferences from agreed facts, then the presumption of the correctness of the trial court's findings does not apply. The courts have so held repeatedly, and have not hesitated to draw different legal conclusions from admitted facts. * * * * * *"

Under this heading Petitioner cites but two cases, both of which are easily distinguishable from the case at bar. They are not apposite to the second question presented by Petitioner and really involve the question of estoppel. In *Thompson v. Phenix Insurance Company*, 136 U.S. 287 (1890), negotiations and assur-

ances of settlement were continued after the limitation time for suit had run. Here the Respondent refused to discuss the claim after such time had run. In *Thompson* no written agreement extending such time was made; here a definite extension with an end period was granted to Petitioner exactly in accordance with its specific request.

The same is likewise true of the other case cited, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). None of the controlling factors present in this case was involved there. This Court decided the *Glus* case solely on the point that the time limit to sue in the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, could be waived by the employer if it misled the employee by its statements and actions that he had seven years within which to sue. Here the Petitioner's attorneys knew well the one year provision for suit in the controlling statute and, having asked for a fixed extension of time, received a written agreement granting the favor asked. In fact, the Court of Appeals cites the *Glus* case against Petitioner's contentions. At page 669 of its opinion in 270 F. 2d. (Appendix to Petition, pp. 14, 15) that Court said:

> "Here, it is the shipper who is acting unconscionably. By inducing the carrier, just four days before the running of the statute, to grant the extension, the shipper put the carrier in the posture of not being able to plead the original statutory period. Now the shippers seek to destroy the effect of the very thing he *(sic)* brought about, after the carrier has changed his position in detrimental

reliance on the shipper's request. 'No man may take advantage of his own wrong'. *Glus v. Brooklyn Eastern District Terminal*, * * * * * *"

V. CONCLUSION.

Accordingly, we submit there is no basis for granting a Writ of Certiorari herein.

Respectfully submitted,

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